Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the State Independent Alliance and	)	
the Independent Telecommunications Group	)	
for a Declaratory Ruling That the Basic Universal	)	WT Docket No. 00-239
Service Offering Provided by Western Wireless	)	
In Kansas is Subject to Regulation as Local	)	
Exchange Service	)	

SPRINT REPLY COMMENTS

Sprint Corporation, on behalf of its local, long distance and wireless divisions ("Sprint"), hereby replies to the comments filed by certain rural incumbent local exchange carriers in support of the petition for reconsideration submitted by the State Independent Alliance and Independent Telecommunications Group (collectively, "Rural ILECs") in response to the *Western Wireless Basic Universal Service Order* ("*BUS Order*").[1] As Sprint demonstrates below, the Rural ILEC argument fails as a matter of law because ancillary fixed services constitute commercial mobile radio services ("CMRS") under the Communications Act, and an equal access requirement is inconsistent with existing Commission rules and orders.

I. THE COMMUNICATIONS ACT CONFERS CMRS STATUS UPON FIXED SERVICES PROVIDED ON AN ANCILLARY BASIS

Fixed services provided by CMRS carriers on an ancillary basis are properly classified as "mobile services" despite the fact that they may not use mobile stations. The ancillary nature of the service is completely independent of the mobility requirement. Because the Rural ILECs

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[1] *See Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas Is Subject to Regulation as Local Exchange Service,* WT Docket No. 00-239, *Memorandum*

cannot challenge the ancillary status of Western's BUS service, they have instead focused on the mobility aspect of the service. Specifically, they contend that BUS is not a mobile service under the Act because, they claim, the BUS terminal ordinarily does not move:

> The Act is clear that services that can be classified as mobile are *only* those which involve a "mobile station" and that a mobile station must be one which "ordinarily does move."[2]

The Rural ILECs have misstated the law, because the statute does *not* require that a mobile terminal move as a condition to being classified as a mobile service – and, therefore treated as CMRS.

The Act does not limit CMRS to only those services that use a mobile station as the Rural ILECs assert. Rather, the Act defines CMRS as "any mobile service (as defined in section 153 of this title)."[3] CMRS services are not subject to rate or entry regulation by the state.[4] The phrase, "mobile services," in turn, is defined in Section 153 to include "*any service* for which a license is required in a personal communications service established pursuant to the proceeding . . . GEN Docket No. 90-314; ET Docket No. 92-100, *or any successor proceeding.*"[5] Congress made clear that the reason it added this clause in 1993 was to <u>*expand*</u> the statutory definition of mobile services.[6]

Opinion and Order, FCC 02-164 (Aug. 2, 2002)("*BUS Order*"). *See also Public Notice,* WT Docket No. 00-239, DA 02-2266 (Sept. 16, 2002).

[2] Reconsideration Petition at 3 (emphasis added). *See also* NTCA Comments at 1-3; OPASTCO Comments at 2-3.

[3] 47 U.S.C. § 332(d)(1).

[4] *Id.* § 332(c)(3).

[5] *Id.* 47 § 153(28)(C)(emphasis added).

[6] Historically, the mobile service definition was limited to radio services "carried on between mobile stations or receivers and land stations, and by mobile stations communications among themselves, and includes both one-way and two-way radio communications services." *Id.* at § 153(n) (1991). Congress acknowledged that in adding language in 1993 to the mobile service definition it was expanding the definition. *See* H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 262 (1993); H.R. Conf. Rep. No. 213, 103rd

The express reference to the PCS docket demonstrates that Congress was well aware of the Commission's then pending proposal to define PCS to include fixed services.[7] In addition, by using the phrase, "or any successor proceeding," Congress further made clear that the Commission was empowered to define the statutory term, "mobile services," in a way that best promotes the public interest — which Congress defined as the promotion of competition and the reduction of regulation.[8]

Fixed services offered on an ancillary basis by cellular and PCS licensees are "mobile services." In its *Second PCS Order*, the Commission defined personal communications services as "[r]adio communications that encompass mobile and *ancillary fixed* communication services that provide services to individuals and businesses and can be integrated with a variety of competing networks."[9] In the same *Order* and consistent with the regulatory parity directives of the 1993 Budget Act, the Commission also amended the cellular rules to permit cellular licensees to

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Cong., 1st Sess. 496 (1993). Because it was known in 1993 that PCS licensees would be providing mobile cellular services, services already encompassed within the pre-1993 mobile services definition, the inescapable conclusion is that in using the phrase "any PCS," Congress meant just that — any PCS, whether fixed or mobile. Any other reading of the 1993 amendments would mean that Congress amended the mobile services definition for no reason. *But see Mosquera-Perez* v. *INS,* 3 F.3d 553, 556 (1st Cir. 1993)("A familiar canon of statutory construction cautions the court to avoid interpreting a statute in such a way as to make part of it meaningless.").

[7] *See PCS NPRM,* GEN Docket No. 90-314, ET Docket No. 92-100, 7 FCC Rcd 5676, 5689 ¶ 30 (1992)("We propose that . . . fixed services generally be allowed."); *id.* at 5750-51, Proposed Rules 99.3 and 99.5; *First PCS Order,* 8 FCC Rcd 7162, 7191-92 (1993)(defining PCS as "flexible radio services that encompass a wide array of mobile and ancillary fixed communications services."). The Supreme Court has repeatedly held that Congress is "presumed to be aware" of agency interpretations of a statute when it amends the statute. *See HUD* v. *Rucker,* 122 S. Ct. 1230, 1234 n.4 (2002); *Lorillard* v. *Pons,* 434 U.S. 575, 580 (1978).

[8] *See* Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996)(" "AN ACT To *promote competition and reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.")(emphasis added).

[9] *Second PCS Order,* 8 FCC Rcd 7700, 7713 ¶ 24 (1993)(emphasis added).

provide personal communications services as well.[10] And, in its order implementing the 1993 Budget Act, the Commission amended its rules to recognize that fixed services provided by CMRS licensees on an ancillary basis are "mobile services" under the Act:

> The following are mobile services within the meaning of Sections 3(n) and 332 of the Communications Act, 47 U.S.C. §§ 153(n), 332:
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> * * *
>
> (g) Auxiliary services provided by mobile service licensees, and *ancillary fixed* communications offered by personal communications service providers.[11]

The Rural ILECs make no attempt to challenge Western Wireless' demonstration that its BUS service is an ancillary service.

In summary, there is no support for the Rural ILEC assertion that CMRS treatment is limited to those services involving radio equipment that ordinarily moves. Put another way, the argument that a BUS terminal does not ordinarily move is legally irrelevant, because the statutory definition of mobile services expressly permits the provision of ancillary fixed services.

II. UNDER COMMISSION PRECEDENT, THE RURAL ILEC COLLATERAL ATTACK ON THE COMMISSION'S FIXED ANCILLARY RULE MUST BE DISMISSED

As noted above, FCC Rule 20.7(g) expressly defines commercial mobile radio services to include "ancillary fixed communications."[12] Unable to challenge Western Wireless' demonstration that its BUS service is an ancillary service, the Rural ILECs instead claim that the Com-

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[10] *See id.* at 7800 *amending* 47 C.F.R. § 22.930.

[11] 47 C.F.R. § 20.7(g)(emphasis added). *See also Second CMRS Order,* 9 FCC Rcd 1411, 1518 (1994)' 47 C.F.R. § 20.9(a)("The following mobile services shall be treated as common carriage services and regulated as commercial mobile radio services (including any such service . . . offered as an auxiliary or ancillary service) . . . (7) Domestic Public Cellular Radio Telecommunications Service (part 22, subpart K of this chapter.").

[12] 47 C.F.R. § 20.7(g).

mission lacked the statutory authority to adopt Rule 20.7(g).[13] This argument fails as a matter of law because, as demonstrated above, Congress amended the definition of mobile services in the 1993 Budget Act to encompass fixed services provided by licensees licensed to offer personal communications services. The Rural ILEC argument also fails as a matter of procedure, and this defect provides additional grounds to dismiss the Reconsideration Petition.

The Commission adopted its "ancillary fixed service is a CMRS" rule over eight years ago in GN Docket No. 93-252.[14] No one appealed this order, and the rules adopted therein are final. In addition, the Commission has repeatedly reaffirmed this rule since then.[15] To Sprint's knowledge, no one (including the Rural ILECs) has appealed the subsequent orders affirming the validity of Rule 20.7(g).

The Commission has held that "indirect challenges to Commission decisions that were adopted in proceedings in which the right to review has expired are considered impermissible collateral attacks and are properly denied."[16] For example, the Commission has stated in dismissing as "procedurally deficient" a petition for clarification:

> To the extent APCO directly challenges earlier Commission decisions, however, we agree . . . that the [clarification] petition is untimely and as such, is dismissed as defective. Likewise, to the extent it indirectly challenges earlier Commission decisions, . . . the [clarification] petition is also procedurally flawed because it effectively is an impermissible collateral attack on final Commission decisions.[17]

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[13] *See* Reconsideration Petition at 10-11; NTCA Comments at 3-4; OPASTCO Comments at 4-5.

[14] *See Second CMRS Order,* 9 FCC Rcd 1411, 1424 ¶ 36, 1518 (1994).

[15] *See, e.g., First Flexible CMRS Offerings Order,* 11 FCC Rcd 8965, 8985 ¶ 48 (1996); *Second Flexible CMRS Offerings Order,* 15 FCC Rcd 14680, 15696 at ¶ 9 (2000). The FCC has further ruled that among the ancillary fixed services that are subject to CMRS/Section 332(c) regulation are wireless local loop services. *See, e.g., Flexible CMRS Offerings NPRM,* 11 FCC Rcd 2445, 2447-48 ¶¶ 11 and 13 (1996).

[16] *Declaratory Rulings Regarding Frequency Coordination in the Private Land Mobile Radio Services,* 14 FCC Rcd 12752, 12757-58 ¶ 11 (1999).

[17] *APCO Petition for Clarification,* 14 FCC Rcd 4339, 4344 ¶ 10 (1999). *See also Canyon Area Residents,* 14 FCC Rcd 8152, 8155 ¶ 10, 8156-57 ¶¶ 16-17 (1999)(dismissing statutory arguments as consti-

The Reconsideration Petition, insofar as it asks the Commission to rule that the provision of ancillary fixed services may not be regulated as CMRS, constitutes "an impermissible attack on final Commission decisions." Based on its own precedent, the Commission has no choice but to dismiss the Petition as "procedurally deficient."

III. UNIVERSAL SERVICE FUNDING CANNOT BE CONDITIONED UPON AN "EQUAL ACCESS" REQUIREMENT

The Rural ILECs ask the Commission to "clarify" that state commissions may bar CMRS carriers from receiving state universal service funding unless they provide what the Act explicitly states they need not provide: equal access to interexchange carriers.[18] A state commission may not condition receipt of universal service funding upon an equal access requirement.

The Communications Act authorizes states to establish state universal service programs and to designate carriers eligible to receive support from these state programs.[19] The Act further empowers states to provide eligibility criteria for their state programs that are in addition to those the Commission adopts for the federal USF program.[20] However, Congress imposed limits on the scope of this state discretion. Specifically, Congress has determined that state USF programs must be "not inconsistent with the Commission's rules to preserve and advance universal service."[21]

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tuting a "collateral attack" that is "not timely"); *Rio Grande Broadcasting,* 14 FCC Rcd 17007 (1999)(dismissing petition as an impermissible collateral attack).

[18] Reconsideration Petition at 9. *See also* NTCA Comments at 4-5; OPASTCO Comments at 6-8. The Nebraska Public Service Commission also filed comments contending that states may require CMRS carriers to offer equal access as an eligibility condition to receipt of state universal service funds.

[19] *See* 47 U.S.C. §§ 254(f), 214(e)(2).

[20] *See id.* at § 254(f).

[21] *Id.*

The Commission, at the recommendation of the Joint Board, adopted competitive neutrality as an additional principle upon which universal service policies are to be based.[22] The Commission has further ruled that requiring CMRS carriers to provide equal access as a condition to receiving universal service support would contravene the principle of competitive neutrality:

> Contrary to Ameritech's argument, competitive neutrality does not require that, in areas where incumbent LECs are required to offer equal access to interexchange service, other carriers receiving universal service support in that area should also be obligated to provide equal access. . . . [W]e find that supporting equal access would undercut local competition and reduce consumer choice and, thus, would undermine one of Congress's overriding goals in adopting the 1996 Act.[23]

The Commission "agree[d] with the Joint Board that any wholesale exclusion of a class of carriers . . . would be inconsistent with the language of the statute and the pro-competitive goals of the 1996 Act."[24]

It becomes immediately apparent that state commissions may not do what the Rural ILECs claim – exclude wireless carriers from universal service funding if they do not provide equal access. Such a ruling would be inconsistent with the Commission's prior rulings on this subject, and as Section 254(f) explicitly provides, state rulings that are inconsistent with FCC rulings are void and unenforceable.

Neither of the two court cases that the Rural ILECs recite supports their argument.[25] Both cases stand for the proposition that a state may impose additional eligibility requirements in

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[22] *See First Universal Service Order,* 12 FCC Rcd 8776, 8801-03 ¶¶ 46-51 (1997).

[23] *Id.* at 8819-20 ¶ 78.

[24] *Id.* at 8858 ¶ 145. The Joint Board recently reexamined the list of services that should be subject to universal service funding, and could reach no agreement on whether to impose equal access as a federal ETC requirement. The Joint Board did not forward to the Commission any recommendation on the issue. *See Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Recommended Decision,* FCC 02J-1, (July 10, 2002).

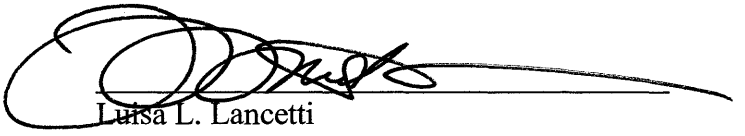
order for carriers to receive state universal service funding. However, and of critical importance, neither case involved a condition that was "inconsistent" with FCC rules and orders. Thus, neither case is dispositive here, because the Commission has squarely ruled that a CMRS equal access requirement would contravene the competitive neutrality principle.

IV. CONCLUSION

For the foregoing reasons, Sprint Corporation respectfully requests that the Commission deny the reconsideration petition filed by the Rural ILECs and affirm that fixed services provided on an ancillary basis are entitled to CMRS treatment.

Respectfully submitted,

Sprint Corporation



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[25] *See Texas Office of Public Utility Counsel* v. *FCC,* 183 F.3d 393, 417-18 (5th Cir. 1999); *WWC Holding Co.* v. *Public Service Commission of Utah,* 44 P.3d 714 (Utah 2000).